IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/04/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1327 of 1991

1. Thamburaja
2. Seetharaman .. Appellants

-Vs-

Kanakasabai Padayachi .. Respondent

Second appeal preferred under Section 100 of the Code of Civil Procedure for the relief as stated therein.

!For Appellants: Mr.R.Subramani

^For Respondent: No appearance.

:JUDGMENT

The above Second Appeal is directed against the decree and judgment dated 31.3.1989 rendered in A.S.No.115 of 1985 by the Court of Subordinate Judge, Cuddalore thereby confirming the judgment and decree dated 20.11.1984 rendered in O.S.No.1359 of 1980 by the Court of Principal District Munsif, Cuddalore, thereby dismissing the suit filed by the plaintiffs/appellants.

2. The appellants herein are the plaintiffs who lost their case before both the Courts below.

3. Tracing the history of the case what comes to be known is that the appellants herein have filed the suit in O.S.No.1359 of 1980 on the file the Court of Principal District Munsif, Cuddalore for declaration and mandatory injunction. The case of the plaintiffs is that the plaintiffs are the owners of Survey No.151/2 on the West in which the plaintiffs have installed an electric motor with service connection No.7; that on the East of Survey number there is a kuttai poramboke in S.No.148; that there is no water in the poramboke and it has been only a barren tract; that the plaintiffs have got lands on the East of the Kuttai; that about 25 years ago, the plaintiffs father formed a channel from the place of the electric motor through the kuttai for irrigating the land on the East; that this channel has been in existence for the past 20 years and more and no one has ever objected to it; that the plaintiffs have acquired an easementary right to take water.

4. The further case of the plaintiffs is that the channel formed by them has been used by the other adjacent land owners also; that if at all, anyone who could object to the channel; that the Government have not objected to the existence of the channel all these years; that the defendant is the owner of the land in S.No.147 on the North of the Kuttai poramboke; that about 10 days back, the defendant highhandedly obstructed the taking of water through the suit channel; that the defendant is also threatening that he would destroy the channel and use the said portion as Kalam; that the defendant has absolutely no right to obstruct the right of irrigation which the plaintiffs have been enjoying for the past 20 years; that the defendant has absolutely no right over the property through which the channel runs; that none of the other owners in the vicinity objects to this channel; that the plaintiff has raised crops in the lands on the East and if obstruction is caused the crops would whither and the plaintiffs would be put to serious and irreparable loss; that the plaintiffs have got every apprehension that the defendant would damage the channel and hence he is filing this suit for declaration to declare that the plaintiff is entitled to take water through the channel from S.No.68/8 through S.No.148/7 and for mandatory injunction directing the defendant to restore the channel shown from A to B in the plan.

5. In the written statement filed by the defendant, the defendant would submit that the suit filed by the plaintiffs is unjust and unsustainable; that the plaintiffs are not entitled to R.S.No.151/2 and it belongs to Rajangam; that the plaint plan is erroneous; that it does not reveal the exact location of the suit property; that S.No.148 has been sub-divided into various divisions and the portion in which the alleged channel is said to exist has been sub-divided as S.No.148/14 and it is classified as a kalam; that it is absolutely false to allege that the plaintiffs father formed any channel running through the suit survey number 148/14; that it is equally false to allege that the said channel has been in existence for the past 20 years and more; that it is, further, false to allege that the plaintiffs have acquired any easementary right to take water through this portion; that the allegation that the defendant obstructed the plaintiffs taking of water about ten days back, as if the channel exists and water flows through the same which are all fictitious and imaginary and they are invented for the purpose of filing the suit; that the defendant has been using the portion marked as AB in the plaint plan, which has been sub-divided as S.No.148/14, as a kalam for over 20 years exclusively; that the plaintiffs have never irrigated their lands with the use of the alleged channel; that there is no such channel in existence; that the area alleged to be used as a channel is in a higher level; that in any event, water cannot flow through the same; that Chitta and Adangal extracts for a period of over 10 years will reveal that the suit property has been used only as kalam by the defendant all along; that further there are patta lands and the plaintiff cannot have channel in the same and the said fact will falsify the plaintiffs case; that the plaintiffs and the defendant have developed enmity after civil disputes have arisen between them and the plaintiffs have now filed this suit to harass the defendant; that the cause of action alleged is false; that the plaintiffs are not entitled to any relief. On such averments, the plaintiffs would pray to dismiss the suit with costs.

6. The learned District Munsif, in consideration of the averments in the plaint and in the written statement, would frame the following issues for consideration:

(i) Whether the plaintiffs are entitled to declaration to the effect that they are entitled to take water through the suit property?
(ii) Whether the plaintiffs are entitled to the relief of mandatory injunction as prayed for? and
iii) What relief the plaintiffs are entitled to?

7. To determine the above issues, the learned District Munsif has conducted the trial in which the first plaintiff besides examining himself as P.W.1 would also examine two other witnesses as P.Ws. 2 and 3 for oral evidence and would also mark 17 documents as Exs.A1 to A1 7 for documentary evidence. Likewise on the part of the defendant, he would examine himself as D.W.1. for oral evidence and he would also mark one document as Ex.B1. for documentary evidence.

8. In consideration of the oral and documentary evidence placed on record by parties in the manner aforementioned and after appreciating the same, the learned District Munsif dismissed the suit filed by the appellants/plaintiffs. Aggrieved by the said judgment and decree, the appellants herein have preferred appeal before the Court of Subordinate Judge, Cuddalore in A.S.Nos.194 of 1985. The learned Subordinate Judge, framing proper points and considering the judgment and decree of the trial Court and hearing both parties, has dismissed the appeal with costs. Aggrieved against the judgment and decree of the lower appellate Court dated 31.3.1989, the appellants have preferred the above Second Appeal on certain grounds as brought-forth in the grounds of appeal for determination of the following substantial questions of law:

(i) Whether in law the courts below have not erred in overlooking that the plaintiffs have established that they have been taking water through the suit channel for well over the statutory period of 20 years?
(ii) Whether in law the lower appellate Court has not erred in not following the procedure laid down in Order 41 Rules 27, 28 and 29 C.P. C. before disposing the appeal?
(iii) Whether in law the decree and judgment of the lower appellate Court in mechanically confirming the decree and judgment of the trial court are not vitiated in that the lower appellate court has not considered the additional document filed or passed any order in I.A.No.34 3 of 1985?
(iv) Whether in law the courts below are right in overlooking that the defendant has obliterated the suit channel and that the plaintiff is entitled to mandatory injunction?

9. During arguments, the learned counsel for the appellants would only reiterate what has been pleaded in the plaint and as grounds of the first appeal so far as the facts and circumstances of the case are concerned. So far as the position of law is concerned, the learned counsel would cite two judgments, the first one rendered in M. AYYASWAMI AND ANOTEHR vs. S.P.GANESAN AND ANOTHER reported in 1994-2-L.W.376 and the second one in

BONDAR SINGH AND OTHERS vs. NIHAL SINGH AND OTHERS reported in 2003(2) Supreme 512.

10. So far as the first judgment cited above is concerned, the Division Bench of this Court, in an appeal filed under Clause 15 of the Letters Patent against the order of a learned single Judge in a petition presented to allow the additional evidence for examining one of the attestors at the stage of first appeal, and while considering the question `whether the application for permission to adduce additional evidence filed in the appeal should have been considered separately or it ought to have been considered along with the appeal', has held:

"It is the settled position of law that an application filed in the Appeal for permission to adduce additional evidence has to be considered along with the main appeal and not separately."

The above proposition has been evolved by the Honourable Division Bench of this Court in consideration of the decision of the Privy Council in KESSOWJI vs. G.I.P.RAILWAY (34 I.A.115) and again reported in PARSOTIM vs. LAL MOHAN (58 I.A. 254 = A.I.R. (18)1931 P.C.143) and in ARJUN SINGH vs. KARTAR SINGH (A.I.R. 1951 S.C.193).

11. In the second judgment cited by the appellant, the Honourable Apex Court has held:

"If the findings of the subordinate courts on facts are contrary to evidence on record and are perverse, such finding can be set aside by the High Court in appeal under Section 100 C.P.C. A High Court cannot shut its eyes to perverse findings of the courts below. In the present case the findings of fact arrived at by the lower appellate court were contrary to evidence on record and, therefore, perverse and the High Court was fully justified in setting aside the same resulting in the appeal being allowed and suit being decreed."

On such arguments, the learned counsel for the appellants would pray to allow the appeal setting aside the judgments of both the Courts below.

12. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for the appellants alone since no representation has been made on the part of the respondent, if a decision has to be made adhering to the substantial questions of law framed, from out of all the four questions framed in the name of substantial questions of law, the one relevant to the subject is pertaining to the Interlocutary application alleged to have been filed in I.A.No.343 of 1985 which the lower appellate Court has never bothered either to deal with or to consider the same with opportunity for parties to be heard and to determine the points involved therein so as to make a decision in compliance of Order 41 Rules 27,28 and 29 wherein the procedures and modalities of causing production and recording the additional evidence are prescribed. Therefore, the only substantial question of law that should be answered in the whole of the above second appeal is `whether the lower appellate Court has erred in not following the procedures laid down under Order 41 Rules 27,28 and 29 CPC before

disposing of the appeal, in dealing with the Interlocutary Application filed on the part of the appellant in I.A.No.343 of 1985?'.

13. The answer is simple that the lower appellate Court has not at all dealt with the said Interlocutary Application regarding the additional evidence nor discussed the same nor arrived at any decision - either to allow or dismiss the said application - so as to decide the first appeal in accordance with law pertaining to the subject depending upon the decision taken in the Interlocutary Application. Since the said I.A. should have also been disposed of along with the appeal and the same has not been done on the part of the first appellate Court, it is just and proper only to decide that the entire judgment delivered by the first appellate Court, without consideration of the I.A. filed for letting in additional evidence, becomes vitiated and hence in these circumstances, adhering to the above judgments cited and the very law on the subject particularly covered under Order 41 Rules 27 ,28 and 29 CPC, this Court is of the view that the only course open for this Court is to set aside the judgment and decree dated 31.3.1989 rendered in A.S.No.115 of 1985 dated 31.3.1989 by the Court of Subordinate Judge, Cuddalore and remand the same to the same Court for considering the I.A.No.343 of 1985 also along with the appeal and hence the following judgment:

In result,
(i)the above second appeal is allowed.
(ii) the judgment and decree dated 31.3.1989 rendered in A.S.No.115 of 1985 by the Court of Subordinate Judge, Cuddalore is hereby set aside.

(iii)The case is remanded to the Court of Subordinate Judge, Cuddalore for following the procedures prescribed under Order 41 Rules 27, 28 and 29 CPC and to decide the said I.A. and thereafter the very appeal suit based on the decision taken in the I.A., on merits and in accordance with law with an opportunity for parties to be heard.

(iv)Since the matter is kept pending from 1980 onwards, it has become incumbent on the part of this Court to further direct the lower appellate Court to complete the legal requirements and to deliver the judgment in the main appeal and also I.A.No.343 of 1985 within three months from the date of receipt of a copy of this judgment and report compliance to this Court.

22.4.2003.
Index: Yes
Internet: Yes
gr/Rao

To

1.The Subordinate Judge,
Cuddalore.

2.The Principal District Munsif,
Cuddalore.